SUPREME COURT, U. S.

FILED

MAY 29 1969

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 986

HILAND DAIRY, INC., ET AL., *Petitioners*

v.

THE KROGER CO., *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENT'S REPLY TO THE MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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RESPONDENT'S REPLY TO THE MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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1. The United States Concedes That the Complaint Was Properly Dismissed Under Rule 12(b), But Proposes To Reinstate It by a Formula Which Subverts the Federal Rules of Civil Procedure and the Function of This Court.

On the very face of its Memorandum,[1] the United States concedes that the complaint was dismissible under Rule 12(b) of the Federal Rules of Civil Procedure for failure to state a claim entitling petitioners to

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[1] Hereafter cited "Mem."

relief.[2] The Government, however, advances the curious proposal that a defective complaint may be salvaged by a mere offer of proof submitted on petition for a writ of certiorari (Mem. 12, 14)—a formula which does not rise even to the dignity of the personal knowledge affidavit specified by Rule 56 for opposing motions for summary judgment. The United States accordingly compounds petitioners' misguided treatment of this Court as a trial forum. (See their Petition at A 23 *et seq.*, particularly A 36-37, A 49, and their Supplemental Brief.) Compare *Lawn* v. *United States*, 355 U.S. 339-54; *McClellan* v. *Carland*, 217 U.S. 268, 283.

In the process, the Government invites this Court to scrap Rule 12(b); to discipline the lower courts for observing the requirements of that Rule; and to penal-

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[2] To quote the United States (Mem. 12, 13):

> "It is, therefore, our view that the petitioners would be entitled to relief under Section 2 if they proved, *in addition to the elements explicitly alleged in the complaint* (see point 2, *supra*), that Kroger (1) specifically intends regularly to sell below cost the milk produced in its plant for the purpose of injuring other dairy processors, or to engage in other unreasonable exclusionary practices, and (2) has performed an overt act to implement that intention. (*Emphasis supplied here and throughout unless otherwise indicated.*)
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> * * *
>
> ". . . the complaint alleges only a specific intent to attain a market position—which, as shown above, does not approach monopoly power—and does *not allege any specific intent to engage in exclusionary conduct amounting to an attempt to monopolize*, . . ."

The United States thus confesses that the complaint fails to satisfy the requirement of Rule 8(a)(2) that it "*shall* contain a short and plain statement of the claim showing that the pleader is entitled to relief."

ize respondent for properly relying upon it. Orderly procedure is subverted at every level of the federal judicial structure.

2. The United States Incorrectly States the Law on Attempts To Monopolize Within the Meaning of Section 2 of the Sherman Act.

(A) First, in attempting to escape the "dangerous probability" test (Mem. 10), the United States completely ignores this Court's decision in *Lorain Journal Co.* v. *United States,* 342 U.S. 143, 153—cited in our Brief In Opposition at 10, 11. The Court there held:

> "To establish this violation of § 2 as charged, it was not necessary to show that success rewarded appellants' attempt to monopolize. The injunctive relief under § 4 sought to forestall that success. While appellants' attempt to monopolize did succeed insofar as it deprived WEOL of income, WEOL has not yet been eliminated. The injunction may save it. '[W]hen that intent [to monopolize] *and the consequent dangerous probability exist,* this statute [the Sherman Act], like many others and like the common law in some cases, *directs itself against that dangerous probability* as well as against the completed result.' Swift & Co. v. United States, 196 U.S. 375, 396. See also, American Tobacco Co. v. United States, 328 U.S. 781; United States v. Aluminum Co. of America, 148 F2d 416, 431."[3]

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[3] There is no merit in the attempted recourse to *Standard Oil Co.* v. *United States,* 221 U.S. 1, 61, to demean the significance of *Swift & Co.* v. *United States,* 196 U.S. 375, 402 as an outmoded invocation of the "common law 'attempt' " concept (Mem. 10). The *Standard Oil* case itself invokes the common law as the proper basis for interpreting Section 2 of the Sherman Act. 221 U.S. at 59.

(B) Second, the United States euphemizes this Court's explicit declaration in *Walker, Inc.* v. *Food Machinery,* 382 U.S. 172, 177, that the "relevant market" is necessarily in issue with reference to an alleged attempt to monopolize (Mem. 11-12). To quote *Walker* (*ibid*):

> "To establish monopolization or *attempt to monopolize* a part of trade or commerce under § 2 of the Sherman Act, it would then be necessary to appraise the exclusionary power of the illegal patent claim *in terms of the relevant market for the product involved.* Without a definition of that market there is no way to measure Food Machinery's ability to lessen or destroy competition."

(C) Third, the United States overstates the meaning of the Court of Appeals decision in *Lessig* v. *Tidewater Oil Company,* 327 F.2d 459, 474-75 (C.A. 9)—quite apart from the fact that the construction of Section 2 in that case is incompatible with this Court's decisions in *Lorain Journal* and *Walker, supra.* The *Lessig* case is invoked for the proposition that the "attempt" proscription of Section 2 is satisfied by a mere showing of "predatory" or "unfair"

> "acts by one competitor that exclude another from the market." (Mem. 10-11.)

The argument thereby not only mistakenly implies that *Lessig* excised the word "monopolize" from the statutory reference to prohibited attempts, but also misapplies that case to the acknowledged facts of this one.

Specifically, the Court in *Lessig* was careful to emphasize, as follows, the presence of evidence of classic

monopoly power in holding that there was a jury issue of attempted monopoly (327 F.2d at 474):

> "*The essence of monopoly is power to control prices and exclude competition,* and what we have said demonstrates that there was evidence that Tidewater possessed the specific intent to acquire and exercise such power with respect to a part of commerce."

And, in contrast to this recital in *Lessig,* the United States here confesses that petitioners' complaint is barren of any allegations warranting any such charge against Kroger. To use the Government's own words (Mem. 9):

> "Thus, there are no facts alleged that support petitioners' conclusion that construction of the plant together with Kroger's control over eight per cent of the retail market for dairy products in the market will give it power over prices or power to exclude and control competition in dairy products (R. 5)."

3. The United States Distorts the Sherman Act by Claiming That Section 2 Applies to Unilateral Acts of "One Competitor That Exclude Another From the Market."

It is elementary that the Sherman Act imposes more rigorous standards than the Clayton Act for establishing an offense. *Times-Picayune Publishing Co.* v. *United States,* 345 U.S. 594, 608-10; *Tampa Electric Co.* v. *Nashville Coal Co.,* 365 U.S. 320, 335. As this Court has recognized, the Clayton Act is nevertheless addressed only to the "protection of *competition,* not *competitors.*"[4] *Brown Shoe Co.* v. *United States,* 370 U.S. 294, 320.

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[4] Emphasis in original.

This case is brought solely under the Sherman Act. Accordingly, petitioners "must measure up to the criteria of the more stringent law." *Times-Picayune, supra,* 345 U.S. at 610. Yet, the United States would stretch Section 2 of the Sherman Act beyond the ambit of the Clayton Act—to protect not "competition," but every "competitor( )".[5]

The misapprehension underlying such an interpretation of the Sherman Act is easily demonstrated. When Congress has determined to inhibit the unilateral conduct of a single actor because of resulting injury to a lone competitor, it has known how to do so. This is evident from § 2(a) of the Clayton Act, as amended by the Robinson-Patman Act—15 U.S.C. § 13(a)— and its application in *Moore* v. *Mead's Fine Bread Co.,* 348 U.S. 115, 118.[6]

The misconception is equally apparent from § 3 of the Robinson-Patman Act which was applied in *United States* v. *National Dairy Corp.*, 372 U.S. 29. Section 3 is in terms addressed to the sale of

> "goods at unreasonably low prices for the purpose of destroying competition *or eliminating a competitor*". 15 U.S.C. § 13a.

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[5] We recognize, of course, that where the violation involves Section 1, 15 U.S.C. § 1, the presence of a forbidden "contract, combination . . . or conspiracy" may bring the Act into play at the behest of a single competitor. *Klor's* v. *Broadway-Hale Stores,* 359 U.S. 207, 212-14.

This case, however, deals with the unilateral conduct of a single actor.

[6] We refer to the following language of Section 2(a) inhibiting price discrimination

> "where the effect . . . may be . . . to injure, destroy, or prevent competition with *any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them.*"

Section 3 was thus squarely aimed at the precise conduct now said to have been covered all the while by the attempted monopoly prohibition of Section 2 of the Sherman Act. To quote the Court in *National Dairy, supra,* 372 U.S. at 34:

> "In proscribing sales at 'unreasonably low prices for the purpose of destroying competition or eliminating a competitor', we believe that Congress condemned sales below cost for such purpose."

Consequently, the import of the Government's memorandum is that the enactment of § 3 of the Robinson-Patman Act was a useless exercise. It claims that Section 2 of the Sherman Act, likewise a criminal statute,[7] already covered the identical subject—namely, predatory "acts by one competitor that exclude another from the market," including specifically "below-cost sales aimed at eliminating other dairy processors". (Mem. 10-11, 12.)[8]

4. The Government's Effort To Revive the Complaint Should Be Rejected as a Matter of Sound Judicial Administration.

Certiorari should be denied in this case, regardless of the propriety of the Government's unique procedural formula or the validity of its unprecedented analysis of Section 2. First, the facts here are conclusive that a trial of this complaint, on the Government's own theory, would simply saddle the District Court with a useless trial. Second, and more broadly—to paraphrase

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[7] 15 U.S.C. § 2.

[8] Section 3 reflects a Congressional mandate that criminal sanctions only were to be applied against the defined conduct. *Nashville Milk Co.* v. *Carnation Co.*, 355 U.S. 373. The present position of the United States would nullify that decision.

the United States—a mandate for trial of the case would burden the federal judiciary with unworthy "lawsuits seeking to stifle the entry of new competitors into the market" (Mem. 13-14).

According to the Government's theory, petitioners could prevail only by proving that Kroger had overtly demonstrated its intent "regularly to sell below-cost" or "actually used its profits from the retail grocery business to subsidize persistent below-cost sales" for the purpose of "eliminating other dairy processors" (Mem. 12). The present record demonstrates the sheer fantasy of this concept.

As the Government expressly recognizes, the complaint admits that Kroger sells only 8 per cent of retail dairy products in the affected territory; that its dairy plant can supply a maximum of 20 per cent of consumer demand for such products; and that its dairy must compete with 70 other dairies now operating in the territory, including the national giants of the industry, who will retain 80 per cent of the market in any event (Mem. 2-3, 8-9). In such a setting, it defies reason to assume that Kroger would elect to pursue a course of conduct which would turn its new dairy—built at a high level of modern construction costs—into a white elephant and simultaneously drain the profits from its retail grocery business.

Plain common sense dictates that the already overworked federal trial courts ought to be spared the burden of full-scale litigation of such a fanciful case. And a flow of similar cases will inevitably follow, if this Court requires trial of the present one.

In sum, if this Court tolerates the notion that defective complaints may be rescued by offers of proof

at the certiorari stage, the net result would be to deny trial courts the protection against empty claims now provided by Rule 12(b). Nor will the federal appellate courts escape the consequences. Whenever 12(b) motions are granted, they will be confronted with the necessity of hearing appeals pursued on the premise that failure to state a claim below may be corrected by an offer of proof at the appellate level.

5. Conclusion

For the reasons stated in this Reply and in our Brief In Opposition, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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